Supreme Court, U.S.
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No. 03-574

In The Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

HONAS RICHARDS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit correctly ruled that the Plaintiff had come forward with enough evidence of proximate cause to preclude summary judgment under the Federal Employers' Liability Act, which vests authority in the jury, except in cases where there is no evidence of causation.

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STATEMENT OF THE CASE

The Sixth Circuit applied the legal standard consistently articulated by this Court in cases brought under The Federal Employers' Liability Act (FELA) and The Federal Safety Appliances Act (FSAA). The Sixth Circuit concluded that the district court's grant of summary judgment in defendant's favor was inconsistent with the proximate cause standard established by this Court early last century and reaffirmed as recently as last Term. This oft cited proximate cause standard requires that FELA and FSAA cases proceed to the jury where "the proofs justify with reason the conclusion that employer [conduct] played any part, *even the slightest*, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 508 (1957) (emphasis added)

I. History of Proceedings Below

This case involves a typical railroad accident that occurred on May 1, 1999. On September 10, 2001, the district court for the Southern District of Ohio granted the Railroad's Motion for Summary Judgment, holding that plaintiff had not come forward with sufficient evidence of proximate causation.

The Sixth Circuit reversed, holding that the district court improperly applied this Court's FELA proximate cause standard to the particular facts of this case. Thereafter, the Railroad filed a petition for rehearing and rehearing en banc in which the Railroad urged the Sixth Circuit to reconsider its ruling based on purported conflicts with the decisions of this Court and other circuits and, indeed, other Sixth Circuit precedents – the exact same argument raised in the Railroad's petition to this Court. The Sixth Circuit unanimously denied

the petition, noting that "no judge of this court [had] requested a vote on the suggestion for rehearing en banc."

II. Statement of Facts

On May 1, 1999, Respondent Honas Richards was employed as a Conrail freight conductor. Near Columbus, Ohio, his train made an emergency application of the air braking system, bringing the train to an unexpected stop. An "emergency" brake application, especially one that the crew does not initiate, can be very dangerous. It can result in derailments, the tossing of employees on the train, the shifting of freight, etc.[1]

Because of this potential for danger, Conrail's rules and common sense mandate that the conductor attempt to determine the cause of the undesired brake application. Getting off the train and walking its length -- no matter how unsafe the ground conditions -- is the only way to do this. While "walking the train," the employee looks for visible defects that may have caused the undesired brake application, such as derailed cars, shifted freight, and other dangerous conditions that can cause an emergency brake application. Mr. Richard's train went into its emergency brake application on the "main track." Railroad tracks are covered with "ballast." Main line track ballast consists of large, loosely

[1] An emergency application of the braking system occurs when the air pressure in the brake system drops suddenly resulting in a much faster than usual application of the air brakes. The crew can initiate an "emergency" application when it needs to quickly stop the train. In addition to a deliberate application of the train's air brake system, trains can also unexpectedly go into "emergency" if the train or air hoses becomes uncoupled or an air hose bursts. (www.trainweb.org/railwaytechnical, North American Freight Train Brakes section, Emergency Braking subsection).

packed rocks. They are very difficult to walk on because the rocks shift, collapse, and move. While Mr. Richards was walking on the ballast, the ballast shifted and/or collapsed beneath his feet. He felt extreme pain in his back, as his body twisted, while trying to prevent his fall.

Mr. Richards was the only employee to inspect the train after it went into "emergency." He had approximately 50 years of railroad experience. This experience included attending classes concerning air brakes, including how the air brake system operates, the functions of the different parts of the air brake system, how and why brake systems malfunction, and what happens during a brake system malfunction. While "walking the train," Mr. Richards eliminated most of the probable causes for the undesired air brake application. There were no leaking air hoses or other problems that would permit air to escape from the air brake system. Using a process of elimination, he concluded that "the only reasonable explanation why that train went into emergency" was "a defective control valve," also known as a "kicker." When asked whether the train would have gone into "emergency" had the kicker been properly functioning, he responded, "Oh, absolutely not." (R 21: Motion, Richards Deposition at 5, 13, 26-27, 80, 91-92, Sixth Circuit JA at 78, 86, 99-100, 153, 164-165; R 24: Motion Response, Richards Affidavit at ¶5, Sixth Circuit JA at page 195)

III. The Court of Appeals Decision

The Sixth Circuit reversed and held that the district court improperly applied this Court's FELA proximate cause standard to the specific facts of this accident. It acknowledged that an antiquated Sixth Circuit decision, pre-dating the FELA's 1939 Amendments, *Reetz v. Chicago & Erie R.R.*, 46 F.2d 50 (6th Cir. 1931), employed an

inappropriately narrow proximate cause analysis. Therefore, it overruled *Reetz* and held that, under the facts of this case, there was proximate cause because "a reasonable jury could conclude that the defective appliance played *any* part, even the slightest, in bringing about the plaintiff's injury." It concluded that "if a reasonable jury could find that the plaintiff's injury 'was within the risk created by' the defective appliance, the plaintiff's right to a jury trial should be preserved." Pet. App. 14a.

REASONS FOR DENYING THE PETITION

Conrail's Petition fundamentally misunderstands the Sixth Circuit's decision. Properly analyzed, that decision provides no compelling reason – in fact, no reason at all – for this Court to grant certiorari. The Sixth Circuit's decision does nothing more than apply the decisions of this Court to the specific facts of Mr. Richards' accident. And it does so consistent with decisions of other federal and state courts of appeals.

I. Review Should Be Denied Because The Sixth Circuit's Decision Is Interlocutory.

Before turning to the bases for review asserted by petitioner, Mr. Richards wishes to draw to this Court's attention a barrier to review that is wholly ignored in the petition: the interlocutory nature of the Sixth Circuit's ruling below.

Although this Court may exercise jurisdiction under 28 U.S.C. § 1254(1) to review interlocutory decisions of federal courts of appeals, it rarely does so, and this case is not the rare case in which interlocutory review is appropriate. "Ordinarily, in the certiorari context, 'this court should not

issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, *unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.*'" Robert L. Stern, et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002) (quoting *American Construction Co. v. Jacksonville, T. & K.W. Railway Co.*, 148 U.S. 372, 384 (1893) (emphasis added)); *see also, e.g., Hamilton-Brown Shoe Co. v. Wolf Bros. Co.*, 240 U.S. 251, 258 (1916) (interlocutory decisions are reviewed only "in extraordinary cases"). This case is anything but "extraordinary." Mr. Richards filed a garden-variety FELA/FSAA case in federal district court, which granted summary judgment to the defendant railroad. The Sixth Circuit reversed and directed simply that, as to causation, the case must be allowed to go to the jury. The defendant retains all other defenses it may have, and the jury is free to decide in favor of the defendant on causation and any other permissible ground. If the defendant prevails, no further review on the question presented would be necessary.

Of course, Mr. Richards believes that his case is meritorious and that he will prevail before a jury. If that occurs, there will be a final non-interlocutory judgment from which the railroad may appeal and ultimately present the causation (and any other federal issue) to this Court for resolution. Indeed, this case is less an appropriate vehicle for immediate, interlocutory review than was true in *Virginia Military Institute v. United States*, 508 U.S. 946 (1993). In *VMI*, the Fourth Circuit had issued a final decision holding that the Commonwealth of Virginia's, sponsorship of a military college for men but not a military college for women, was unconstitutional, but the district court had yet to rule on the appropriate remedy. The Court denied certiorari on the ground that the decision was not sufficiently final because the remedy phase had not occurred. *See id.* (Scalia, J.,

concurring). The Court recognized that there would be time enough to review the decision, if necessary after the remedial portion of the case was decided, *id.*, and, in fact, it later did so. *United States v. Virginia*, 518 U.S. 515 (1996). Here, of course, a final decision is lacking, not only as to remedy (damages), but as to liability as well.

If, in the future, Mr. Richards were to be awarded damages, this Court could later review the question presented in a subsequent petition. *See* 508 U.S. 946 (Scalia, J., concurring). Moreover, unlike the *VMI* case, which was *sui generis*, here, if petitioner is correct that the lower courts are in disarray over the question presented — a point with which Mr. Richards strenuously disagrees — there will be any number of other, *appropriate* future vehicles that would allow this Court to address the question presented.

II. The Sixth Circuit Has Properly Applied This Court's FELA Proximate Cause Standard.

A. The Sixth Circuit Did Not Reject *Davis v. Wolf* Nor Did It Hold That Proximate Cause Did Not Apply In FELA Cases.

The decision below is consistent with all decisions of this Court, including *Davis v. Wolf*, 263 U.S. 239 (1923). The Sixth Circuit did not reject the necessity of showing proximate cause in FELA cases. On the contrary, in rejecting its antiquated *Reetz* decision, the Sixth Circuit substantially relied upon the rationales of two other courts, both of which used the proper proximate cause standard.

New York, New Haven and Hartford R. Co., v. Leary, 204 F.2d 461 (1st Cir. 1953), involved a defective air brake system, which caused the train to stop. The plaintiff exited

the train, in the fog and dark, to inspect the problem and repair it. While doing so, he fell off a railroad trestle that had no sides or railings. In rejecting *Reetz*, the First Circuit relied on the following statements in *Coray v. Southern Pacific Co.*, 335 U.S. 520, 522-23 (1949), "In this case where undisputed evidence established that the train suddenly stopped because of defective air-brake appliances, petitioner was entitled to recover if this defective equipment was the **sole or a contributory proximate cause** of the decedent employee's death. . ." *Id.* at 522-523 (emphasis added).

Warning v. Thompson, 249 S.W.2d 335 (Mo. 1952), involved an employee injured while attempting to repair defective locomotive sanders. The Supreme Court of Missouri, in rejecting *Reetz* specifically cited this Court's decision in *Davis*, stating, "The employee may recover 'if the failure to comply with the requirements of the [Locomotive Inspection] Act is a **proximate cause** of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.'" *Id.* at 340 (emphasis added).

After citing *Leary* and *Warning* with approval, the Sixth Circuit below concluded, "We now join those courts that have rejected *Reetz*." By joining the *Leary* and *Warning* courts, the Sixth Circuit embraces *Davis* and its proximate cause standard. The inconsistency between the Sixth Circuit and this Court, suggested by the Petitioners, is nonexistent.

B. The Sixth Circuit Did Not Effectively Hold That *Rogers* Overruled *Davis v. Wolf,* But Rather It Recognized That *Rogers* Applied The Concept Of Proximate Cause Used In *Davis*.

The Petition wrongly argues that the Sixth Circuit assumed that *Davis* is no longer good law, that it has rejected the FELA proximate cause standard, and that it has replaced it with the standard set forth in *Rogers*. The fundamental flaw in Petitioner's argument is that it assumes that *Davis* and *Rogers* are incompatible. *Rogers* does not eliminate the concept of proximate cause, but further elucidates this Court's definition of "proximate cause" in FELA/FSAA cases.

Prior to the 1939 Amendments to the FELA, the courts interpreted the statute very narrowly – in other words, favorably to defendants. Although this Court immediately recognized the liberalizing effect of the 1939 Amendments, *Lilly v. Grand Trunk Western R. Co.,* 317 U.S. 481, 486 (1943); *Urie v. Thompson,* 337 U.S. 163, 180-81 (1949), the lower courts were slow to adjust their thinking. In 1957, this Court observed, "In a relatively large percentage of the cases reviewed, the Court has found that lower courts have not given proper scope to . . . the congressional scheme." *Rogers,* 352 U.S. at 510. The Court went on: "The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." *Id.* at 509.

This Court noted the following important Congressional policy behind the FELA:

> The **Congress** when adopting the law **was particularly concerned that the issues** whether there was employer fault and whether that fault played any part in the injury or death of the employee **should be decided by the jury** whenever fair-minded men could reach these conclusions on the evidence. Originally, judicial administration of the 1908 Act substantially limited the cases in which employees were allowed a jury determination. * * * Congress corrected this by the 1939 amendments and removed the fetters which hobbled the full play of the basic congressional intention to leave to the fact-finding function of the jury the decision of the primary question raised in these cases--whether employer fault played any part in the employee's mishap."

Id., 352 U.S. at 508-09 (emphasis added).

Because the concept of proximate cause is so difficult to define, this Court chose to instruct the lower courts by articulating what the term "proximate cause," as used in *Davis*, means in FELA/FSAA cases after the 1939 Amendments:

> "For practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit."

Id. at 508.

During the past 50 years, and as recently as last Term, this Court has consistently reaffirmed the definition of proximate cause that it articulated in *Rogers*. *See Norfolk &*

Western Ry. Co. v. Ayers, 123 S.Ct. 1210, 1226 (2003)(citing *Rogers*); *Gotshall v. Consolidated Rail Corp.*, 512 U.S. 532, 542-543 (1994)(citing *Rogers*); *Atchison, Topeka And Santa Fe Ry Company v. Buell,* 480 U.S. 557, 562 n. 8 (1987)(citing *Rogers*).

The Sixth Circuit below applied *Rogers'* definition of proximate cause to the specific facts of Mr. Richard's accident:

> As other courts have recognized, however, a jury might reasonably have concluded that Richards only was injured because the braking system failed to function properly, it was his duty to identify and remedy the defect, and the proper method for fulfilling his responsibilities was walking the train. ***Rogers* makes clear that where the evidence allows more than one outcome on the issue of causation, the issue should be decided by a jury, not a judge.** *Rogers,* 352 U.S. at 506-07, 77 S.Ct. 443. * * * **Courts in FSAA cases (and FELA and BIA cases as well) should focus on whether a reasonable jury could conclude that the defective appliance played *any* part, even the slightest, in bringing about the plaintiff's injury.** This means that if a reasonable jury could find that the plaintiff's injury "was within the risk created by" the defective appliance, the plaintiff's right to a jury trial should be preserved."

Pet. App. 14a (emphasis added).

In other words, the Sixth Circuit analyzed the peculiar facts of Mr. Richards' railroad accident and concluded that a reasonable jury could find that his injuries were caused by the defective air brake system. The Sixth Circuit did not ignore

the concept of proximate cause, it did not reject the *Davis v. Wolf* requirement of proximate cause, and it did not rule that *Rogers* abrogated *Davis*. Instead, using this Court's definition of proximate cause in *Rogers*, the Sixth Circuit concluded that causation might exist under the facts of this case and that the district court erred in its application of this Court's long-standing case law.

In sum, the Sixth Circuit committed no legal error, let alone one worthy of certiorari.

III. The Decision Below Is Not In Conflict With Any Decisions Of This Court Nor Are The Federal And State Appellate Courts In Conflict Over The Applicable Proximate Cause Standard In FELA/FSAA Cases.

Petitioner's assertion that there is a conflict in the courts on the proximate cause standard to be applied in FELA/FSAA cases lacks merit. This supposed "conflict" results solely from the proper application of this Court's decisions to varying factual situations. Furthermore, while some courts describe the proper standard in slightly different terms, an examination of the cases reveal that their analytical processes are consistent with each other and with the decisions of this Court. The asserted conflict is thus illusory.

Petitioner cites several cases for the proposition that *Rogers* did not eliminate the concept of "proximate cause" in FELA cases. *See* Pet. at 19-22. These cases need not be addressed individually because Respondent agrees with this statement of law. As noted in Part I above, the decision below does not assert that *Rogers* eliminated the FELA's proximate cause requirement. Rather, the Sixth Circuit recognized that proximate cause must be established in FELA

cases and that *Rogers* defines the concept of proximate cause in light of the 1939 FELA Amendments. Hence, there is no conflict between the Sixth Circuit and those cited cases.

Petitioner argues that the Sixth Circuit's decision conflicts with *Reed v. Pennsylvania R. Co.*, 171 N.E.2d 718 (Ohio 1961), *cert. denied*, 366 U.S. 936 (1961). It does not. Both courts applied the same standard of law. However, the facts in *Reed* are significantly different from the facts here and this difference accounts for the divergent results. Mr. Richards "only was injured because the braking system failed to function properly, **it was his duty to identify and remedy the defect**, and the proper method for fulfilling his responsibilities was walking the train." Pet. App. 14a (emphasis added). However, in *Reed*, the employee "**was not required to and did not help in repairing such defect** but after stopping the train 'just sat' in the engine cab for 45 minutes." *Reed,* 171 N.E.2d at 718 (emphasis added). This distinction is important because here it was **the defective brakes** that required Mr. Richards to be in a dangerous place, while it *Reed,* the defective brakes were not the reason that the plaintiff was in a dangerous place.

Nor does the decision below conflict with *Marazzato v. Burlington Northern R. Co.*, 817 P.2d 672 (Mont. 1991). *Marazzato* resulted in a different outcome from the Sixth Circuit below because of different facts. In *Marazzato,* an employee committed suicide allegedly because his employer required him to remain in a room without supervised work activities during his shift. The court affirmed the grant of summary judgment because the employee "had not established that it was foreseeable by Burlington Northern that its actions would result in the decedent's suicide." *Id.* at 673. In this case, however, it was not only foreseeable that a defective air

brake system would require the employee to walk the train on dangerous terrain, but it was required by Conrail rules.

The Petitioner also cites *Chapman v. Union Pacific R.R.*, 467 N.W.2d 388 (Neb. 1991), however this decision is even farther afield than the other cases cited. *Chapman* did not address FELA proximate cause, but instead focused on whether the employee presented sufficient medical causation evidence that his injuries had been caused by the absence of a headrest in a railroad motor vehicle which had been rear-ended in a routine traffic accident. *Id.* at 396.

Finally, in an effort to establish a conflict, Petitioner lists several other cases that it asserts eliminate the proximate cause requirement in FELA/FSAA cases. Careful analyses of these cases demonstrate that Petitioner's characterization is inaccurate. These cases, while sometimes using imprecise language, all use a mode of analysis that demonstrates the courts' recognition that proximate cause is applicable in FELA/FSAA cases.[2]

[2] *Johnson v. Offshore Express, Inc.*, 845 F.2d 1347, 1355 (5th Cir. 1988), *cert. denied, 488 U.S. 968* (1988)(emphasis added)(The Court of Appeals accepted the need for proximate cause in a Jones Act case, which is similar to a FELA case: "we hold that the district court was not clearly erroneous in finding that the M/V CHAMPION EXPRESS was unseaworthy and this unseaworthiness **was a proximate cause** of Johnson's injury. "); *Paige v. St. Louis S.W. Ry.*, 312 F.2d 84, 92 (5th Cir. 1963)(emphasis added)(Contrary to Petitioner's assertion, the court did not reject proximate cause in FELA cases. The Fifth Circuit explained, "This case **does not call for any wholesale condemnation of the use of language of proximate causation in cases under this Act**. Our holding is confined to the instructions and the **facts of this particular case**."); *Armstrong v. Kansas City Southern Ry. Co.*, 752 F.2d 1110, 1113 (5th Cir. 1985)(The court recognized the need for proximate cause in FELA cases, but also understood that *Rogers*

defined proximate cause in cases brought under the statute.); *Nicholson v. Erie R.R Co.*, 253 F.2d 939 (2d Cir. 1959)(emphasis added)(Although the Second Circuit uses imprecise language in discussing the standard that applies in FELA cases, the court's analysis demonstrates its understanding that proximate cause applies in FELA cases and the court applied it. The court held, affirming the dismissal of the employee's case, "causation certainly would not even meet the modest requirements of the terms of the F.E.L.A. The fault would be **too far removed** both in space and time from the injury."); *Ulfik v. Metro-North Commuter R.R.*, 77 F.3d 54 (2d Cir. 1996) (The court did not reject proximate cause nor suggest that it was unnecessary in FELA cases. Instead, the court utilized the *Rogers* definition of proximate cause and applied this Court's proximate cause analysis in *Gallick v. Baltimore & Ohio Railroad*, 372 U.S. 108 (1963)); *Fletcher v. Union Pacific R.R.*, 621 F.2d 902 (8th Cir. 1980), *cert. denied,* 449 U.S. 1110 (1981)(The *Rogers* proximate cause definition is briefly mentioned, but it is not discussed. This case only concerned the application of the FELA's statute of limitations to occupational and traumatic injuries.); *Claar v. Burlington Northern R.R.*, 29 F.3d 499 (8th Cir. 1994) (This court correctly noted that the proximate cause standard in FELA cases is less stringent than in common law cases and cited the *Rogers* definition of FELA proximate cause. The court's analysis demonstrates that it did not ignore the concept of causation and the court agreed that dismissal of the employees' claims was proper.); *Oglesby v. Southern Pacific Transportation Co.*, 6 F.3d 603 (9th Cir. 1993) (The court did not reject proximate cause in FELA cases. Instead, it cited *Davis* and *Rogers*, holding that *Davis* requires proximate cause in FELA cases and that *Rogers* defines what that concept means in FELA cases.); *Summers v. Missouri Pacific R.R. System,* 132 F.3d 599, 607 (10th Cir. 1997)(Although the court did suggest that proximate cause is no longer necessary, analysis of the case reveals that this statement is not as sweeping as it appears. The Tenth Circuit used the words "sole cause" and "proximate cause" synonymously. It noted, "The phrase 'resulting in whole or in part' was obviously designed to make even more explicit that negligence of an employer did not have to be the sole

IV. No Policy Reasons Compel Review.

Petitioner makes some sweeping policy statements that will be addressed briefly. First, it suggests that this Court should address when a FELA case must go to a jury because this Court has not addressed the standard in 50 years. Not so. Just last Term, in *Ayers*, 123 S.Ct. at 1226, the Court cited and reaffirmed the validity of the *Rogers* definition of proximate cause in FLEA cases. It also did so in the 1994 *Gotshall* decision, 512 U.S. at 542-43, and the 1987 *Buell* decision, 480 U.S. at 557, 562 n. 8.

Petitioner also suggests that *Rogers'* proximate cause standard should not apply in FSAA cases, because an award against the railroad would not be reduced by any contributory negligence. It refers to this outcome as "senseless." However, this Court has previously addressed this allegedly "harsh" outcome, in *Coray*,

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cause or 'the proximate cause' of the injury in order to justify recovery." The court further explained that under *Rogers*, traditional common law causation standards are replaced by the requirements of the statute defined in *Rogers*.); *McCalley v. Seaboard Coast Line R.R.*, 265 So.2d 11 (Fla. 1972)(Respondent admits that this case appears to broadly dispense with proximate cause in FELA cases. However, the decision is not as broad as it first seems. The court indicated that federal law had "substantially modif[ied] the classic concept of proximate cause" in FELA cases. Modified is different from eliminated. Furthermore, a later Florida Supreme Court case, *Adams v. Seaboard Coast Line R.R.*, 296 So.2d 1 (Fla. 1974), does not dismiss the railroad's proximate cause argument, but merely finds that under the *Rogers* definition of proximate cause, the employee's case was properly submitted to the jury which entered a verdict for the employee. Florida courts review FELA cases using a proximate cause analysis.)

> "The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose. The statute declares that railroads shall be responsible for their employees' deaths 'resulting in whole or in part' from defective appliances such as were here maintained. And to make its purpose crystal clear, Congress has also provided that 'no such employee * * * shall be held to have been guilty of contributory negligence in any case' where a violation of the Safety Appliance Act, such as the one here, 'contributed to the * * * death of such employee.' **Congress has thus for its own reasons imposed extraordinary safety obligations upon railroads** and has commanded that if a breach of these obligations contributes in part to an employee's death, the railroad must pay damages."

335 U.S. at 524 (emphasis added). The outcome is not "senseless" as suggested by the Petitioner, but consistent with Congress' imposition of an "extraordinary safety obligation" on railroads. Petitioner's policy concern should be addressed to Congress, not this Court.

Finally, Petitioner argues that if courts continue to follow *Rogers'* definition of proximate cause in FELA cases, there will be "grave ramifications" and an "unwarranted expansion of railroad liability." Lower courts have been applying *Rogers* for almost 50 years and as noted above, this Court has consistently reaffirmed it as recently as last year. Petitioner has made no showing that FELA liability has expanded in recent years or that Congress' will has been thwarted in any way. In any event, if Petitioner's concerns about increasing railroad liability are correct, they are correct only because of

Congress' policy of maximum protection for railroad employees. Those arguments should be addressed to Congress, not this Court.

CONCLUSION

The Petition for a Writ Certiorari should be denied.

Respectfully submitted,

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